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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1050

KOHLER CO., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

## PETITIONER KOHLER CO.'S SUPPLEMENTAL BRIEF AND REPLY TO BRIEF IN OPPOSITION

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There are two aspects of the Government's Brief in Opposition which require response:

1. The Government misstates Petitioner's position on the issue of corporate criminal responsibility. However effective it may be, as a tactic, for the Government to raise and demolish straw man issues, for it to do so here can only obscure the question of whether this Petition presents an issue respecting the nature of corporate criminal liability on which this Court should speak.

2. The Government's Brief misstates the facts and cites to the Court portions of the record which do not support its factual assertions. The prosecutors used this tactic repeatedly in the trial below and before the Court of Appeals; that it has again appeared at this level and in a case involving charges that the Government lawyers intentionally inflamed the prejudice and bias of

the jury against the Defendants and failed to produce *Brady* material is itself a consideration relevant to a determination of whether review is here needed to enable this Court to investigate and correct a serious and apparently habitual disregard of their professional obligations by representatives of the Department of Justice.

## I. THE QUESTION OF CORPORATE CRIMINAL RESPONSIBILITY.

The Government's Brief notwithstanding (p.27), Petitioner does not contend here (and did not contend below) that a corporation is immune from criminal responsibility merely because actions taken by its employee for its benefit are contrary to the employer's instructions. Kohler contended only that the violation of such instructions is a circumstance which is relevant to the question of corporate criminal responsibility for such acts.

(See Restatement *Agency 2d*, § 34, Comment g; § 228; § 229; §235, Comment (a).)

The court below refused Kohler's repeated requests to have the jury told that, among other things, it could consider the fact that such instructions had been given in deciding whether the employee's actions were authorized (Pet. 91a-96a)[1]. In contrast, the court affirmatively charged the jury that the fact that such instructions had been given was *not* a defense if the employee's acts were within the scope of his employment *or* apparent authority. (Pet. 94a) In this and in other respects, the legal and factual questions presented

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1. Reference is to Kohler's Petition for Certiorari.

by the issue of Kohler's responsibility for its employee's acts were not fairly submitted to the jury. (See Pet., pp. 5-10) In affirming Kohler's conviction, the Court of Appeals relied upon decisions of lower federal courts which sanction the imposition of criminal responsibility on corporations on evidence and under instructions which would not be tolerated by the court in cases involving the question of a corporation's civil liability for tortious acts. No decision of this Court has ever discursively reviewed the nature of corporate criminal responsibility for violations of the Antitrust Laws nor the appropriateness of the criteria which are being applied to such cases by certain of the Courts of Appeals and other lower federal courts.

In a report released on January 7, 1971 (after the Petition for Certiorari had been filed) the National Commission on Reform of Federal Criminal Laws recommended that Congress adopt, as part of a new Federal Criminal Code, a standard which would impose criminal responsibility upon a corporation only where an agent acting "within the scope of his employment" engages in conduct which is authorized, requested or commanded by persons having proper authority. In its final report, the Commission withdrew an earlier recommendation that corporate responsibility could be based upon acts done "in furtherance of its affairs on the basis of conduct . . . ratified or recklessly tolerated . . ."

(Report of National Commission on Reform of Federal Criminal Laws, § 402.)

*Supplemental Brief and Reply Brief in Opposition.*

The division which the report shows to exist within the Commission as to the proper standard for the imposition of corporate criminal responsibility underscores the appropriateness of this Court's granting certiorari in order to review and settle the question. The fact that the evidence in this case and the instructions given at trial would not fairly meet the standards proposed by either the majority or the minority in the report makes it clear that this case is an appropriate vehicle for such review.

## II. THE FACTUAL MISSTATEMENTS IN THE GOVERNMENT'S BRIEF IN OPPOSITION.

Appellants had complained to the Court of Appeals that the attorneys for the Government breached their professional obligations of candor and fairness both at the trial and on the appeal. (See Joint Brief in Court of Appeals, pp. 188-191; Reply Brief in Court of Appeals, pp. 2-3) Aware that mere error will not, of itself, support a request for certiorari, Petitioner did not seek review by this Court of the rejection of these complaints. It appears that the Government, having succeeded with such tactics below, is pursuing them again before this Court.

Only a limited analysis of such defects can be made in a short presentation. Therefore, the misstatements of fact can only be illustrated:

*Item 1*: On page 7 of the Government's Brief in Opposition, the statement is made:

> "The conspirators, fearing that this increase would not hold firm, met at the Waldorf-Astoria Hotel in New York on February 7, 1963,' * * * to try to main-

> tain the new prices' (Pet. App. 12a). Petitioner *Decker*, Quinn and *Hold* were present, as were *Reich of Borg-Warner* and several other high ranking sales officials (Pet. App. 13a-14a)."
> (Emphasis added)

The underscored statement is apparently drawn from testimony concerning the persons who were present at a PPMA meeting held on February 7, 1953, rather than (as it implies) from the testimony concerning those who were present at a conspiratorial meeting which allegedly followed. No witness testified that Decker, Held or Reich was present at the conspiratorial meeting. (JA 293a, 301a-308a; KA 20a-21a; 42a-46a; 64a-65a.)[2] Held specifically denied being present, and his denial was supported by other evidence. (KA 42a.)

*Item 2:* In footnote 9 on p. 9 of the Government Brief, after reference to the commercial standards published by the Department of Commerce, the statement is made:

> "Since the standard is purely voluntary, it could not require the conspirators to discontinue the use of regular enameled cast iron fixtures."
> (Emphasis added)

This assertion disregards the distinction between the effect of the publication of the standard and the effect of its acceptance. As stated in the published standards themselves:

"1. Enforcement. — Commercial Standards are

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2. JA references are to the Joint Appendix on the appeals below; KA references are to the Appendix to the Kohler-Held Separate Brief on those appeals.

commodity specifications *voluntarily established by mutual consent of those concerned.* They present a common basis of understanding between the producer, distributor, and consumer and should not be confused with any plan of governmental regulation or control. The United States Department of Commerce has no regulatory power in the enforcement of their provisions, but since they represent the will of the interested groups as a whole, *their provisions through usage soon become established as trade customs, and are made effective through incorporation into sales contracts by means of labels, invoices, and the like.*

"2. The acceptor's responsibility. — The purpose of Commercial Standards is to establish, for specific commodities, nationally recognized grades or consumer criteria, and the benefits therefrom will be measurable in direct proportion to their general recognition and actual use. *Instances will occur when it may be necessary to deviate from the standard and the signing of an acceptance does not preclude such departures; however, such signature indicates an intention to follow the standard, where practicable, in the production, distribution, or consumption of the article in question.*"

(Emphasis added) [GX 539; E 158, p. 24][3]

All of the corporate Defendants were acceptors of the standard, as were dozens of distributors, users and others, including agencies of the United States. [GX 539; E 158, p. 21]

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3. E ..... reference is to documents reproduced in the Exhibits to Joint Appendix.

*Item 3*: In footnote 19, p. 10 of the Government Brief, the assertion is made:

> "The record shows that the conspirators had frequently discussed the need to eliminate regular enamel and to restructure the prices of acid-resistant enamel before: at the Sheraton-Chicago meeting in September, 1962 (JA 371a, 534a-535a, 477a-479a); at meetings at the Shoreham Hotel in November, 1962 (JA 435a-439a, 442a-444a, 458-459a; 524); at the Americana Hotel in New York (JA 376a-377a)."
>
> (Emphasis added)

The record references which are given do not support the assertion that there was any discussion at the Sheraton-Chicago meeting in September 1962 or at the Shoreham Hotel in November 1962 of "restructuring the prices of acid-resistant enamel." The earliest reference in the testimony to any discussion concerning the prices of acid-resistant products was to a discussion which supposedly began at a formal PPMA meeting at the Americana Hotel in December 1962 and the testimony was that the discussion was promptly halted by Mr. Quinn, who was presiding over the meeting. (JA 376a-377a.)

*Item 4*: In connection with its discussion of the prejudicial Kohler Strike cross-examination, the Government, in footnote 25, p. 25 represents to this Court:

> "Indeed, the prosecutor first sought to avoid injection of these considerations into the case by unsuccessfully objecting to the entire line of examination on direct as immaterial. (Pet. App. 24a; JA 1734a)."

The record does not support this contention. The facts are there was no objection by the Government to Held's brief testimony concerning the broad history of Kohler Co. (JA 1733a-1734a) The only objections in the course of this testimony was one to an earlier question about the employment at Kohler of other members of Held's family (JA 1731a-1732a) and a later objection to a question concerning the acquisition by Kohler of a plant at Spartanburg, South Carolina in the early 1960's, which was after the Kohler Strike had ended. (JA 1733a-1734a) The assertion by the Government that it sought to avoid injection of the considerations into the case by unsuccessful objections is a flat misstatement of the record. By the time the Government made the objection to which the Court is cited, the testimony referred to had already been given *without objection*. (JA 1734a)

*Item 5*: On p. 26 of the Government Brief, the Government asserts concerning the Kohler Strike references:

> ". . . in keeping with Kohler's request, the matter was not even adverted to in the summations or the jury charge . . ."

While it is true that the Kohler Strike was not adverted to in the summations, this was not "in keeping with Kohler's request." At the close of the case, Kohler asked the court for a ruling that no counsel should refer to the strike in his closing argument, but the Government opposed the request and the court declined to grant it. In the course of the discussion of the request, the Government expressly threatened to bring up the pre-1960 strike in its closing if Kohler, in its closing, should refer to the evidence concerning the Company's need to main-

tain a steady level of employment in the period after September 1962, long after the strike had ended. (T 9503-9511)[4]

A candid statement of the matter by the Government would have been that the Kohler Strike issue was not referred to in the closings only because Kohler had been intimidated by the Government's blackmail threat to reinject this inflammatory issue into the case if Kohler should argue to the jury that its business interests in the period of the alleged conspiracy required that it maintain a high sales volume, and therefore that its interests could not have been served by an agreement which might tend to restrict its competitive activities.

* * * *

In addition to the misstatements of fact which are illustrated above, the Government, in its efforts to support the lower court's erroneous conclusion that the evidence of Defendants' guilt was "compelling" and "overwhelming", overstates the facts, frequently omitting significant testimony which should be considered in determining whether the totality of the evidence in favor of guilt was "overwhelming."

Much is made of the fact that Kohler, for example, later published prices which allegedly were discussed or agreed upon at the various gatherings referred to in the testimony. The evidentiary value of Kohler's subsequent publishing of these prices, however, can be fairly evaluated only in the light of the following testimony, to which no reference is made:

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4. Reference is to the transcript of testimony at the trial. The relevant portions of this colloquy — which does not appear in the Appendices on Appeal — is printed in the appendix to this Brief. (infra, pp 14-16.)

1. Persons with authority to determine Kohler's published prices had no knowledge of Held's having met with its competitors or of there having been any such discussions of prices with its competitors. [KA 39a-41a; 89a-93a; 96a-100a; 106a; JA 151a-55a]

2. The prices published by Kohler were subsequent not only to the alleged conspiratorial gatherings, but were subsequent also to the announcement of price changes by its largest competitor, American Standard.[5] [GX 401, E-100; GX 403, E-104; GX 405, E 108; GX 407, E 112; GX 409, E 116; GX 411, E 120; GX 413, E 124; GX 415, E 128; GX 417, E 132; GX 419, E 136; GX 421, E 140; GX 423, E 142; GX 426, E 144]

3. The price moves of the indicated manufacturers were neither simultaneous nor identical, notwithstanding their being treated as such by the Court of Appeals and by the Government in its argument to this court. The dates of the various announcements of the changes in published prices span anywhere from a few days to several months, as is shown by the Government Exhibits referred to above. Moreover, only a few high volume items were offered by the companies at identical prices. Thus, the prices in the Kohler price book published in February 1963 had prices ranging from 18% below American Standard's to 10% above. (KA 98a) Of all

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5. Richard McLaren, head of the Antitrust Division of the Dept. of Justice, and one of the attorneys on the Government's Brief, was quoted in the October 1969 *Dun's Review* as having said in an interview that he saw nothing "peculiar or significant in the fact that one company raised prices and the others followed . . . In an industry where you have a very similar product, sort of a basic product without style or trademark features, its more or less unusual to have different list prices."

the items listed in this catalog, which numbered into the hundreds, there was only one identical price. (EA 99a) Kohler and its competitors ez would be expected, had similar prices on some items, but even on these, prices actually received were "all over the lot." (EA 138a-39a; 153a-55a; 168a-69a)

A further illustration of the Government's unfairly adding to the testimony of a witness deserves comment:

According to the Government's theory, the conspiracy began at a cocktail party held in a hotel room at the Sheraton-Chicago Hotel on September 17, 1962, on the evening before a PPMA meeting. The testimony was that this was a social affair with men gathering in small moving groups, engaged in a variety of small talk. (JA 80a-81a, 91a, 127a-128a, 157a) The affair lasted several hours (JA 91a) and Held was the last to arrive and the first to leave. (JA 159a)

The Government's witness Callanan testified that there was some discussion of increased bath tub prices during the course of the evening. (JA 78a-85a) In the course of this testimony, Callanan was asked whether Held participated in the discussions and answered:

> "I don't remember Mr. Held talking, but he was there listening."
>
> (JA 79a)

In using this testimony in its brief below, the Government felt constrained to add the phrase "to them" to Callanan's answer.

This editorial addition was adopted by the Court of Appeals which stated in its Opinion,

> "... although Callanan could not recall specific

> statements by each attendee, he did testify that Defendant Keich (Borg-Warner) participated in price discussions and that Appellant Held (Kohler) 'was there listening' to them." (Pet 9a)

While it can certainly be argued that it is a permissible inference that because Held was present and "listening" during some part of this long gathering, he was "listening" to the price discussions which Callanan said had occurred. Callanan, however, did not say this, at most it is an inference. Fairness requires that the Government explicitly reveal when it has thus enlarged a witness' testimony by adding to it matters to which he has not testified but which the Government contends may be inferred. *Re Greenberg* (1954) 15 N. J. 132, 104 A2d 46, 47.[6]

Petitioner wants to make it clear that it is not arguing the sufficiency of the evidence to support a finding of guilt. The point is that in arguing that the errors found by the court below should be disregarded as "harmless error," the Government relies heavily upon its contention that the evidence of Petitioner's guilt was "overwhelming." In making this argument, it is wrong for the Government totally to disregard the mass of evidence favorable to Defendant. No fair evaluation of the relative weight of the evidence for and against guilt can be made by weighing only that evidence favorable to guilt. Moreover, the Government's evaluation of the evidence is additionally distorted by the Government's penchant for stating the evidence more favorably to the

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6. Mr. Justice Brennan was a member of the Supreme Court of New Jersey which decided this case.

Government than the testimony warrants. Inquiry into the questions which are before this Court in this and its companion petitions requires that the Court be given an evaluation of the facts which is "exactly and fairly stated." *Stubbs v. California* (1959) 362 U.S. 165, 172.

If the doctrine of "harmless error" is to be applied here, the scales of justice should bear the label "honest weight".

Respectfully submitted,

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## APPENDIX

(from transcript of proceedings at trial)

* * * *

[9503] *Mr. Helwig*: I have handed to the Court, I believe — I have handed to the clerk—

*The Court*: I am coming to that next. You may make a motion with reference to the Kohler strike, but I want to see if anything else is desired.

I would be very happy if we could arrive at some understanding or some feeling that nobody is being deprived of rights.

Go ahead, Mr. Fricano.

*Mr. Fricano*: I think that is entirely up to Mr. Helwig, your Honor. The United States did not inject this aspect in this case. This was done by Kohler Company and by Mr. Held.

Accordingly, if upon summation Mr. Helwig and Mr. Unkovic feel it desirable, as apparently they did during their case, to leave the door open to something like this, [9504] then I think it quite fair that the United States can comment upon it.

*The Court*: I think that is more or less your answer. If you say anything about it, he will.

*Mr. Helwig*: Of course, I will not make any explicit reference to the Kohler strike, your Honor, or to any interrogation or any other matter about it. I think though, that there is an ambiguity in the present state of our consideration, which is implicit in Mr. Fricano's statement that we brought the matter out.

* * * *

[9507] *Mr. Helwig*: So that all counsel will know, Your Honor, I represent to the Court, and to all counsel, that the Kohler Company does not intend to make, and will not make, any reference to the strike, or any matter related thereto in its closing argument.

*The Court*: There you are, Mr. Fricano.

*Mr. Helwig*: I don't want to be misunderstood on this. This is without restriction to the possibility that Kohler Company may refer in its summation or argument to the interest of the Kohler Company in steady and level employment in the period between September, 1962, and 1966. I haven't decided one way or the other on that.

So there is no ambiguity, I wanted to make it clear that if I do that, I would not consider it to be inconsistent with the representation I am making now.

* * * *

*Mr. Fricano*: With respect to Mr. Helwig's last point concerning his judgment as to whether or not he will pursue that line of argument before the jury, that is to say, Kohler Company's interest in keeping a level [9508] and steady employment in the indictment period, it is our judgment that is one of the principal grounds upon which the door to the Kohler strike was opened.

They have contended throughout this case, as they did through Dr. Beckman, that they were selling below cost. One of the reasons they were selling below cost was to make sure their employees as to which they had a tremendous responsibility in Sheboygan, Wisconsin — that is way up north some place — could be maintained.

I respectfully submit, Your Honor, that if Mr. Helwig goes into this area, that the door is wide open.

*Mr. Helwig*: If the Court please, if that occurs, and there is a conviction, we will be in the Court of Appeals on that point.

*The Court*: Mr. Helwig, you are going to be in the Court of Appeals in any event, if there is a conviction.

*Mr. Helwig*: That is right, Your Honor.

*The Court*: It doesn't make any difference then. The Court of Appeals will have one more point, that is all.

• • • •